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SUPREME COURT, U.S.
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October Term, [redacted] 1970

No. 350

THE LOS ANGELES HERALD-EXAMINER, Division of The Hearst Corporation; and THE SAN FRANCISCO EXAMINER, Division of The Hearst Corporation,

Petitioners,

vs.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD; SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMAN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMAN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; AND LOS ANGELES PAPER HANDLERS' UNION NO. 3,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CHARLES G. BAKALY, JR.,
611 West Sixth Street,
Los Angeles, Calif. 90017,
Attorney for Petitioners.

Of Counsel:
GARRETT McENERNEY, II,
McENERNEY & JACOBS,
500 Sansome Street,
San Francisco, Calif. 94111,

STEPHEN P. PEPE,
O'MELVENY & MYERS,
611 West Sixth Street,
Los Angeles, Calif. 90017.

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vs.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD; SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMAN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMAN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; AND LOS ANGELES PAPER HANDLERS' UNION NO. 3,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, the Los Angeles Herald-Examiner, Division of The Hearst Corporation, and the San Francisco Examiner, Division of The Hearst Corporation, charging parties in an action filed by the National Labor Relations Board, pray that a writ of certiorari issue to review the final orders of the United States Court of Appeals for the Ninth Circuit denying petitioner party status.

Opinions Below

The court of appeals' orders dismissed petitioners' appeal of a decision of the district court dissolving temporary injunctions issued pursuant to Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), and denied petitioners' motion to intervene in the appeal of the National Labor Relations Board. Neither of these orders was officially reported or accompanied by an opinion of the court and are attached in Appendix A.

Jurisdiction

The orders of the court of appeals dismissing petitioners' appeal and denying petitioners' motion to intervene were entered on May 19, 1970, and June 15, 1970, respectively. The jurisdiction of this Court to review the court of appeals' orders is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Does a charging party, in an action filed by the National Labor Relations Board under Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), have standing to initiate appellate review of an adverse and prejudicial district court decision?

2. Does a charging party, in an action filed by the National Labor Relations Board under Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), have the right to intervene as a party in the National Labor Relations Board's appeal of an adverse and prejudicial district court decision?

Statute Involved

Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title . . . . If, . . . the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . ."

Statement of the Case

This case originated from charges filed with the National Labor Relations Board (hereinafter referred to as the "Board") by petitioners alleging that the respondent labor organizations had engaged in and were engaging in illegal secondary boycotts within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act, as amended, (hereinafter referred to as the "Act"). After a preliminary investigation, respondent Ralph E. Kennedy, Regional Director of Region 21 of the Board, concluded that there was reasonable cause to believe that the respondent labor organizations were engaging in unfair labor practices and, pursuant to Section 10(l) of the Act, filed a petition in the United States District Court for the Northern District of California seeking a temporary injunction pending a final adjudication by the Board. Thereafter, by their counsel, all parties, including petitioners, appeared, presented evidence and orally argued. On February 7 and 8, 1968, the district court found there was reasonable cause to believe that an unfair labor practice had occurred and issued temporary injunctions.

Thereafter, the respondent labor organizations appealed to the United States Court of Appeals for the Ninth Circuit. Petitioners herein moved to intervene as appellees in that action, but the court of appeals ultimately denied that motion, relegating petitioners to the role of *amici curiae*. Petitioners herein then petitioned this Court for a writ of certiorari to review the court of appeals' decision denying intervention, but such petition was denied. 393 U.S. 926 (1968). On June 4, 1969, the court of appeals affirmed the district court's decision. *San Francisco-Oak-*

land Newspaper Guild, et al. v. Kennedy, 412 F. 2d 541 (9th Cir. 1969).

On February 20, 1970, the respondent labor organizations moved the district court to dissolve the temporary injunctions because of the Board's inordinate delay in deciding the underlying unfair labor practice case. Petitioners and respondent Kennedy each appeared by counsel, presented evidence, filed pleadings and orally argued in opposition to the motion to dissolve. On April 6, 1970, the district court entered an order dissolving the temporary injunctions. That same day petitioners and respondent Kennedy filed separate notices of appeal and each moved the court of appeals to stay the order of the district court during the pendency of the appeal.

On April 14, 1970, the court of appeals granted petitioners' motion to stay the district court's order but took no action on respondent Kennedy's motion. Subsequently respondent Kennedy and respondent labor organizations each moved the court of appeals to dismiss petitioners' appeal for lack of standing. Respondent Kennedy further moved the court to reconsider and modify its order granting a stay to reflect that the stay was granted pursuant to respondent Kennedy's motion. On May 19, 1970, the court of appeals dismissed petitioners' appeal and modified the order granting the stay to reflect that it was issued pursuant to respondent Kennedy's motion. On May 28, 1970, petitioners moved the court of appeals for leave to intervene in respondent Kennedy's appeal; this motion was denied on June 15, 1970.

Reasons for Granting the Writ

1. The issue raised in this petition is important and recurring in the administration of the National Labor Relations Act.

This issue involves the obtaining of injunctive relief under Section 10(l) of the Act. In 1947, Congress, by enacting Section 8(b)(4)(B) of the Labor Management Relations Act, made it an unfair labor practice for a labor organization to engage in a secondary boycott. As a result of extensive evidence regarding the substantial injury to neutral employers victimized by an unlawful secondary boycott, Congress imposed, in Section 10(1), a mandatory duty upon the Board to seek injunctive relief whenever it has reasonable cause to believe that an employer's charge of an illegal secondary boycott is meritorious. Moreover, Congress took the unusual action in Section 10(l) of authorizing district courts to provide injunctive relief for such employers, and exempted such proceedings from the prohibitions of the Norris-La Guardia Act. This Congressional action clearly shows that Congress considered the obtaining of injunctive relief under Section 10(l) to be an important matter. In 1959, Congress, in amending the Labor Management Relations Act of 1947 by expanding its coverage, again indicated the importance of Section 10(1).

The same issue raised in this petition was before the Court in *Sears Roebuck & Co. v. Local 419 Carpet Layers*, 90 S. Ct. 1299 (1970). The Court, after granting certiorari and hearing oral argument, ruled that the case had been rendered moot by the Board decision on the merits of the initial charge—a fact present and

briefed when certiorari was granted. The importance of this issue to the administration of the Act is persuasively exhibited by the Board's position on the mootness issue in *Sears*. During oral argument, Dominich L. Manoli, Associate General Counsel for the Board, stated: "[W]hile I think our argument on the mootness is strong, at the same time I would like to have an answer from the Court as to the standing of charging parties in this case." In response to a question from the bench suggesting that the Board would like the decision only if favorable to its position, Mr. Manoli answered: "Either way, your honor, either way." *Sears*, Record of Oral Argument at 48.

The recurrent nature of the initial question of this petition is demonstrated by the fact that it has been before the Court this term in three separate cases: the instant case; *Sears;* and *Terminal Freight Cooperative Asso. v. Samoff*, Docket No. 1481, Oct. Term 1969; *cert. denied*, June 16, 1970, 38 U.S. L.W. 3497, where the Board also argued mootness. Moreover, the recurrent nature of the second question of this petition is demonstrated by the fact that it was raised last term in *Los Angeles Herald-Examiner v. San Francisco-Oakland Newspaper Guild, et al.*, 393 U.S. 926 (1968). The issue presented in this petition would have been decided in *Sears* but for the fact that the Court held that case to be moot. The instant case is not moot and is ripe for decision on this important and recurring question.

2. The orders of the court of appeals dismissing petitioners' appeal and denying leave to intervene conflict with general principles enunciated by this Court in *Local 238 UAW v. Scofield* and *Local 133 UAW v. Fafnir Bearing Co.*, 382 U.S. 205 (1965).

In *Fafnir*, a successful charging party before the Board sought to intervene in the court of appeals' review of the Board's decision. The Court of Appeals for the Second Circuit refused intervention and relegated the charging party to *amicus curiae* status. This Court reversed, stating that the status of *amicus* would not assure the charging party that its private interests created by the Act would be adequately protected by the Board. Of particular concern to the Court was the possibility that the status of *amicus* would not entitle the charging party to petition this Court for a writ of certiorari to review an adverse appellate court decision. 382 U.S. at 214-16.

The underlying theory of *Fafnir* is that, since a charging party is accorded certain private rights, it is inconsistent to force such charging party to rely upon the Board to protect those interests. This rationale applies equally well to the instant situation, for petitioners face the distinct possibility that the Board may not advance arguments necessary to protect the interest of petitioners in appealing the district court's dissolution of the temporary injunctions. In this case the injunctions were dissolved solely because of the Board's delay in deciding the underlying unfair labor practice case and the Board has not argued that a Writ of Mandamus against it is a more appropriate remedy than dissolution of the restraining orders. The impact of the dissolution operates solely on the charging parties, who have no control over the

Board's administrative delay. *Cf. NLRB v. J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258 (1969). However, a writ of mandamus would cause a Board decision, the relief desired.

As was noted in *Fafnir*, there are numerous other reasons why the Board may not adequately represent the private interests of charging parties, ranging from an unfavorable attitude toward petitioners' position to reasons unrelated to the merits of the controversy. Nowhere is this better illustrated than in *Sears*, where the regional director declined to appeal the adverse district court decision. Both the trial examiner and the Board ruled that Sears' unfair labor practice charge was meritorious. Thus, Sears, the aggrieved charging party, was denied Section 10(1) relief in a situation for which it was unquestionably intended solely because it was held not to have the right to appeal the district court's clearly erroneous refusal to issue a Section 10(1) injunction.

The fact that the Board initiates an appeal, as it has in this case, does not guarantee that the appeal will not be dismissed. Should the regional director withdraw his appeal, for whatever reason, or should he not petition this Court for certiorari in the event of an adverse court of appeals' decision, petitioners would be denied the right to have this Court review the decision of the district court on the merits. As demonstrated by *Sears*, this can produce harsh, unfair results that circumvent the express purposes of Section 10(1). Moreover, protection of petitioners' statutorily established private rights would be left to the discretion of another party which is clearly in derogation of the principles established in *Fafnir*.

3. The decision by the court of appeals erroneously interprets and applies Section 10(l) of the Act. The effect of the decision that charging parties may not initiate an appeal or intervene in the Board's appeal is that they are not to be accorded the status of parties. Section 10(l) expressly provides that:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . ."

The natural consequence of these express provisions is that the charging party in the district court, without the approval of the court or of the other parties, may call and cross-examine witnesses, offer evidence, introduce documents, argue orally and file briefs. These statutorily created participatory rights equal those of a party and exceed those accorded *amici curiae*. *Amici* are not entitled to control or develop the record by introducing evidence, raising objections or arguing during the course of the litigation.

Pursuant to their rights under Section 10(l), petitioners-charging parties actively participated in the district court's proceedings by appearing, filing pleadings and orally arguing. Having done so, it is only just and reasonable that they be entitled to seek review of an adverse decision. In an analogous case, the same court of appeals held that because Section 206 of the Bankruptcy Act (11 U.S.C. Section 606) provides that various persons not named as parties in the statute have a statutory right to be heard in the original bankruptcy proceedings, there necessarily must be a concomitant right of such persons to appeal an adverse

decision. *Gleeson v. Carr*, 219 F. 2d 64, 67, *cert. denied*, 350 U.S. 827 (1955). Charging parties in Section 10(l) proceedings at the district court level have the "right to be heard" and by a parity of reasoning should be entitled to initiate an appeal or, at the very least, should be entitled to intervene in the Board's appeal.

It is anticipated that respondents will contend that the Norris-La Guardia Act denies petitioners the status of parties at any stage of Section 10(l) litigation. However, the scheme of Section 10(1) demonstrates that its purpose was to limit the right of employers to initiate injunction proceedings, not to deny them party status. This measure represented a congressional compromise between a need to protect neutral employers from secondary boycotts and a desire to preserve the Norris-LaGuardia Act. Mandatory injunctive relief was afforded employers as an effective remedy for secondary boycotts, but the right to initiate such relief was limited to the Board. Charging parties were expressly accorded full participatory rights in the proceedings once instituted in the district court. To proscribe the application of the Norris-LaGuardia Act to Section 10(l) proceedings, Section 10(h) of the Act exempts all of Section 10 from the prohibitions of Norris-LaGuardia.

The view that charging parties must rely upon the Board to protect their interests throughout the entire course of the litigation is an illogical extension of the Board's exclusive right to initiate Section 10(l) proceedings. It does not follow that restrictions on the right to initiate district court proceedings dictate that charging parties must be denied party status at any stage of the litigation. Such a conclusion confuses the related but distinct concepts of jurisdiction and relief.

The court of appeals has recognized this distinction in *Local 137 Retail Clerks v. Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965). In that case the regional director petitioned the district court for Section 10(1) injunctive relief to prevent enforcement of a "hot cargo" agreement. Instead of pursuing that petition, the regional director entered into a stipulated settlement and sought court approval in lieu of an injunction. The charging parties successfully urged the district court to grant injunctive relief pursuant to the regional director's petition. On appeal, the court of appeals held that once the regional director had complied with his mandatory duty to initiate a suit for injunctive relief, the charging parties could pursue that relief so long as they did not independently petition the court and so long as they sought the same relief, reasoning that charging parties were merely "supporting" the original petition. In the instant case, petitioners' appeal supports not only the regional director's original suit for injunctive relief but also his appeal to reverse the district court's wrongful recision of that relief. On the basis of this reasoning, it is submitted that, once the Board initiates a Section 10(1) proceeding, jurisdiction attaches and the question becomes one of the nature of relief available, not the authority of the court to grant relief. Hence, the court of appeals' decision that charging parties lack standing to seek appellate relief from an adverse decision of the district court is erroneous.

Conclusion

For the foregoing reasons, it is urged that this petition for writ of certiorari be granted.

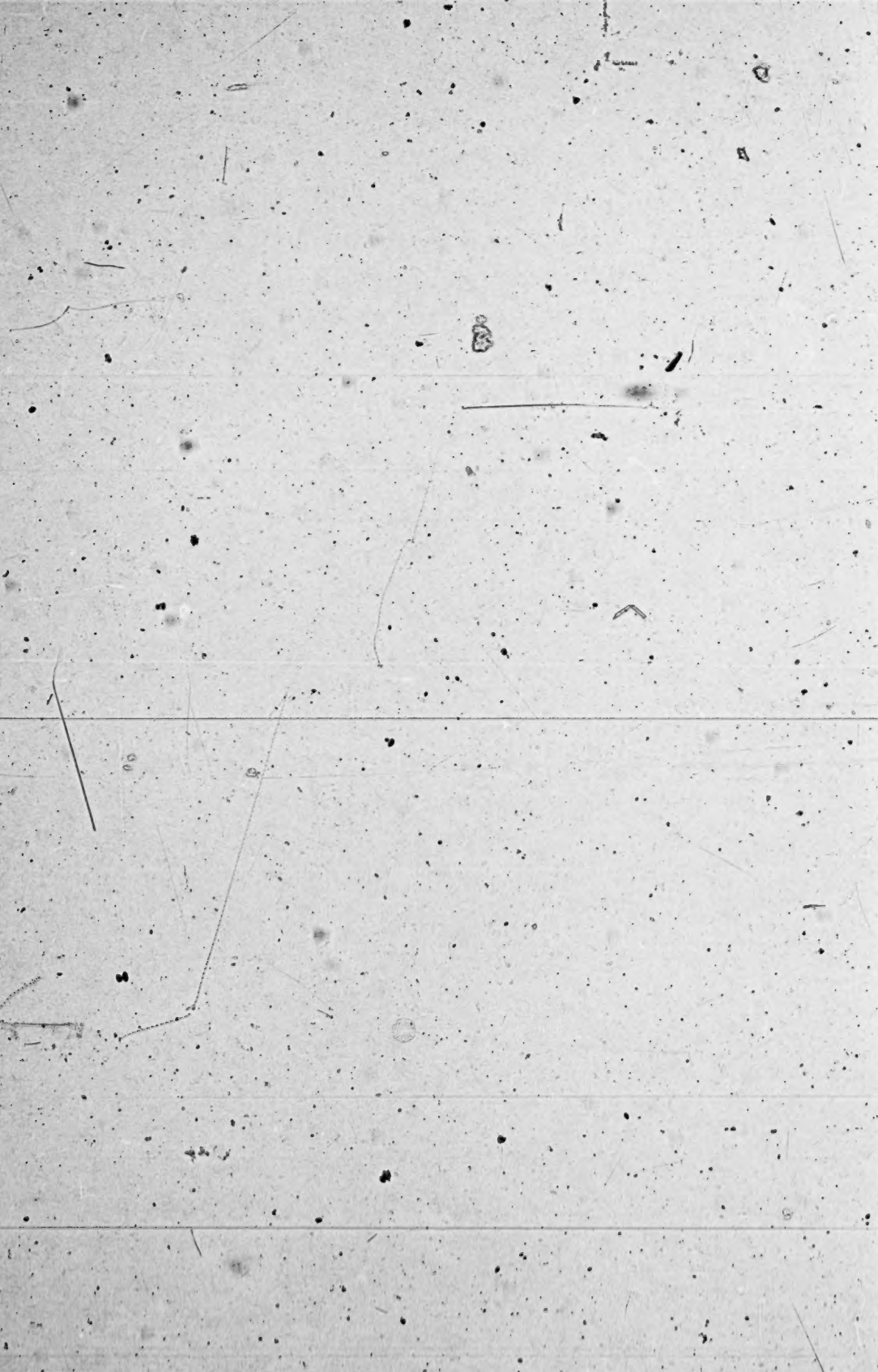
Respectfully submitted,

CHARLES G. BAKALY, JR.,
Attorney for Petitioners.

Of Counsel:

GARRETT MCENERNEY, II,
MCENERNEY & JACOBS,
STEPHEN P. PEPE,
O'MELVENY & MYERS,

June 30, 1970.



APPENDIX A.

ORDER

On Motion for Reconsideration and for Modification of Order Granting Stay.

United States Court of Appeals, for the Ninth Circuit.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Appellant, v. San Francisco-Oakland Newspaper Guild, et al., Appellees. No. 25,655, No. 25,656.

Filed: May 19, 1970.

On April 14, 1970, this court entered an order in cause No. 25,655 granting a motion of appellants charging parties for a stay of an order dissolving temporary injunctions pending determination of the appeal and granting an application to expedite the appeal. That order is hereby VACATED.

The motion of appellant, Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, to dismiss the appeal of the Los Angeles Herald-Examiner, Division of the Hearst Corporation, and the San Francisco Examiner, Division of the Hearst Corporation, charging parties in proceedings filed before the National Labor Relations Board on April 6, 1970 is hereby GRANTED.

The application of Regional Director of Region 21 of the National Labor Relations Board, appellant in cause No. 25,656, for a stay of so much of the order of the court below dissolving temporary injunctions not stayed pending determination of the appeal, good

cause having been shown therefor, is hereby GRANTED, and it is

ORDERED that the order of the court below granting motion to dissolve temporary injunction and the supplemental temporary injunction entered in the United States District Court for the Northern District of California on February 7 and 8, 1968, respectively, in Civil No. 48511, is STAYED fully and in all respects and such injunctions are deemed to be in full force and effect pending determination of the appeal herein.

Briefs may be filed in the ordinary course.

James M. Carter
Orell M. Trask
Circuit Judges

ORDER

In the United States Court of Appeals for the Ninth Circuit.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board; Appellant, vs. San Francisco-Oakland Newspaper Guild; et al., Appellees. No. 25,656.

Filed June 15, 1970.

Before: MERRILL and TRASK, Circuit Judges.

Leave to intervene sought by charging parties, the Los Angeles Herald-Examiner, Division of The Hearst Corporation, and the San Francisco Examiner, Division of The Hearst Corporation, is hereby denied.

Charles M. Merrill
Orell M. Trask
Circuit Judges

APPENDIX B.

ORDER GRANTING MOTION TO DISSOLVE TEMPORARY INJUNCTIONS

United States District Court, Northern District of California.

Ralph E. Kennedy, etc., Petitioner, v. San Francisco-Oakland Newspaper Guild, et al., Respondents. Civil No. 48511.

This cause came on to be heard upon respondents' motion to dissolve temporary injunctions.

Upon consideration of the motion, responses thereto, affidavits, and other evidence, briefs, arguments of counsel, and the entire record in the case, and the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that respondents' motion to dissolve the temporary injunction granted herein on February 7, 1968, and the supplemental temporary injunction granted herein on February 8, 1968, be, and the same hereby is, granted, and the said injunctions are hereby dissolved.

Dated: April 6, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge